Supreme Court, U.S.
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No. Office of the Clerk

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS B. FELDMAN,

Petitioner,

v.

CHUNG-WU HO and BOARD OF TRUSTEES
OF SOUTHERN ILLINOIS UNIVERSITY,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a state university fires a professor in retaliation for speaking out about academic misconduct, is the discharge reviewable under the First Amendment standards set forth in *Waters v. Churchill*, 511 U.S. 661 (1994), as several Courts of Appeals have held, or is the university's action immune from judicial review, as the Seventh Circuit held below?

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Mark Feldman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-9a) is reported at 171 F.3d 494. The opinion of the District Court (App., *infra*, 10a-19a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 1999. App., *infra*, 1a. The Court of Appeals denied a timely petition for rehearing on April 16, 1999. App., *infra*, 20a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

Petitioner Marcus Feldman is a mathematician. He was fired by his employer, respondent Board of Trustees of Southern Illinois University ("the University"), in retaliation for calling attention to the academic misconduct of a colleague. He brought this lawsuit against the University under 42 U.S.C. §1983, on the ground that the University's decision to terminate his contract infringed his freedom of speech under the First and Fourteenth Amendments to the United States Constitution, and against respondent Chung-Wu Ho, the chair of the University's mathematics department, under state tort law.

Feldman prevailed in the District Court. A jury entered verdicts in his favor against both respondents, and awarded him compensatory and punitive damages. The Court of Appeals reversed.

1. Feldman received his Ph.D. in 1986 and promptly accepted a tenure-track position with the University as an Assistant Professor in the Department of Mathematics and Statistics. In 1988, Feldman discovered that a colleague, Ursula Ledzewicz, had falsely claimed to be the co-author of a book by a prominent mathematician. The following year, when Ledzewicz was being considered for tenure, Feldman told Ho about Ledzewicz's false claim. Ledzewicz was granted tenure. Not long after, at Ho's instigation, Feldman was fired.

2. Feldman brought a §1983 action in the United States District Court for the Southern District of Illinois, against the University and several University administrators, including Ho, alleging that he had been fired in retaliation for speech protected by the First Amendment. On interlocutory appeal, the Court of Appeals for the Seventh Circuit held that Ho and the other individual defendants were entitled to qualified immunity. The Court of Appeals remanded the case to the District Court for further proceedings against the University. *Feldman v. Bahn*, 12 F.3d 730 (CA7 1993), cert. denied, 513 U.S. 1014 (1994).

Feldman also filed a suit against Ho in Illinois state court, alleging in relevant part that Ho had tortiously interfered with his contract with the University. In 1995, the Circuit Court of Madison County granted Feldman leave to amend his complaint to add the §1983 claim against the University. The University then removed the case to the United States District Court for the Southern District of Illinois. The resulting case–comprising a §1983 claim against the University and a state law tort claim against Ho–is the subject of this petition.

The District Court held a jury trial on both claims in early 1997. The respondents attempted to persuade the jury that Feldman was fired because he was a poor teacher who

did not get along well with students or colleagues, but the jury instead believed Feldman's evidence, and found that he had in fact been fired in retaliation for exposing Ledzewicz's misconduct. The jury awarded Feldman $203,918 in compensatory damages for the loss of past earnings, and an additional $50,000 in punitive damages.

3. The Court of Appeals for the Seventh Circuit reversed. "Given the verdict," the court acknowledged, "we must assume that Ho reacted adversely to Feldman's accusation against his colleague and that this led the University to end Feldman's employment." App., *infra*, 2a. The court further recognized that the academic misconduct of teachers at a state university is an issue of public importance, under *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education*, 391 U.S. 563 (1968). App., *infra*, 2a-3a.

The court nevertheless held as a matter of law that Feldman's freedom of speech had not been infringed, because universities enjoy a special constitutional status. "A university's academic independence is protected by the Constitution, just like a faculty member's own speech," the court began. App., *infra*, 3a. When a faculty member is fired for exposing misconduct within the university, the court reasoned, the firing ought not to be judicially reviewable for consistency with the First Amendment. "A university is entitled to decide for itself whether the charge is sound," the court held; "transferring that decision to the jury in the name of the first amendment would undermine the university's mission." App., *infra*, 6a. The court declared that academic independence is simply incompatible with judicial review of cases involving academic misconduct: "If the kind of decision Southern Illinois University made about Feldman is mete [sic] for litigation, then we might as well commit all tenure decisions to juries, for all are equally based on speech." App.,

infra, 6a. As a result, Feldman's allegation could have been correct, and the University's conduct completely unjustified and vindictive, and yet Feldman could still not bring a §1983 action based on the First Amendment. "If the University erred in telling Feldman to seek employment elsewhere that is unfortunate," the court concluded, "but the only way to preserve academic freedom is to keep claims of academic error out of the legal maw." App., *infra*, 6a-7a.

The court also reversed on the state tort claim, on the ground that the absence of a constitutional violation, under Illinois law, entitled Ho to immunity from suit. App., *infra*, 8a-9a.

REASONS FOR GRANTING THE PETITION

In this case the Seventh Circuit has carved out a new kind of privilege for public universities to fire teachers in retaliation for speaking out on issues of academic misconduct. This new privilege is inconsistent with the line of cases culminating in *Waters v. Churchill*, 511 U.S. 661 (1994). The decision below creates a conflict with the several Courts of Appeals that have correctly applied *Waters* and its predecessors to cases involving universities and charges of academic misconduct, cases in which the Courts of Appeals have recognized no such special status for universities. Perhaps worst of all, in a poorly-targeted effort to advance the cause of academic freedom, the Seventh Circuit has placed true academic freedom in danger, by adding a new risk to ordinary scholarly critique–the risk of losing one's job.

1. The First and Fourteenth Amendments prohibit the discharge of a government employee in retaliation for the employee's speech, where the subject of the speech is a matter of public concern, and where the importance of the speech is not outweighed by the government's interest in

efficient administration. *Waters*, 511 U.S., at 668; *Connick*, 461 U.S., at 142; *Pickering*, 391 U.S., at 568. State colleges and universities enjoy no exemption from this doctrine. As this Court has made clear, when a professor alleges that he was fired for criticizing the way in which his college is administered, he has stated "a bona fide constitutional claim." *Perry v. Sindermann*, 408 U.S. 593, 598 (1972).

In the decision below, the Seventh Circuit held that university professors fired for speaking out on academic issues can state no such claim. The demands of academic independence, the Seventh Circuit believed, require that such discharges be unreviewable under the First Amendment. The holding is impossible to square with the decisions of this Court cited in the previous paragraph. This Court has certainly never suggested that state universities should be treated differently from other state agencies, much less that academic employment decisions are unreviewable. Mr. Sindermann himself had been discharged for criticizing the administrators of his college on an academic issue–whether the college ought to shift to a four-year program. *Perry*, 408 U.S., at 595. Indeed, this Court has already rejected a similar assertion of a special First Amendment privilege for universities, also supposedly grounded in academic freedom. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 196-97 (1990). Academic personnel decisions often require specialized knowledge, but so do personnel decisions in many other settings. Until now, no court has ever suggested that different First Amendment standards are necessary for different agencies of government.

Because the facts were disputed at trial, the Seventh Circuit held, the University had the right to resolve for itself–without judicial review–whether Feldman's charge of misconduct was accurate. This aspect of the holding is directly contrary to *Waters*, which specifies exactly how such

a case ought to be reviewed. According to *Waters*, courts must defer to the employer's reasonable view of the facts. If the University reasonably believed, after investigating with due care, that Feldman's charge was unwarranted, it could not be found to have violated Feldman's First Amendment rights, even if Feldman's charge was later found to have been correct. *Waters*, 511 U.S., at 677-78. But *Waters* specifically rejected the view taken by the Seventh Circuit in the decision below–that the employer's view of the facts, reasonable or not, is dispositive. *Id.*, at 677.

2. The decision below also creates a conflict with the several circuits that have correctly applied *Waters* and its predecessors to cases involving college professors fired after leveling charges of academic misconduct. In each of these cases, the Court of Appeals simply conducted the normal First Amendment balancing set forth in *Pickering*, *Connick*, and *Waters*. In none did any of the Courts of Appeals suggest, as the Seventh Circuit did below, that universities enjoy any kind of special protection from suit.

In *Powell v. Gallentine*, 992 F.2d 1088 (CA10 1993), for example, a university professor was fired after exposing a colleague's grade fraud. The Tenth Circuit straightforwardly applied *Pickering* and *Connick*, and balanced the professor's interest in speaking against the University's interest in efficient operation, *id.*, at 1090-91, without the slightest suggestion that courts ought to keep out of such disputes. The Tenth Circuit did the same in *Gardetto v. Mason*, 100 F.3d 803, 815-16 (CA10 1996), a case involving a professor fired for alleging, among other things, that the president of her college was holding himself out as a doctor without possessing a doctoral degree. *See also Bunger v. University of Oklahoma Board of Regents*, 95 F.3d 987, 991-92 (CA10 1996).

The issue recurs frequently, to say the least. The other circuits to have addressed it–the Second, Third, Fourth, Fifth, Sixth, Eighth, and Ninth–have likewise treated state universities like any other state agency. *Jeffries v. Harleston*, 52 F.3d 9, 12-14 (CA2), cert. denied, 516 U.S. 862 (1995); *San Filippo v. Bongiovanni*, 30 F.3d 424, 434, 441 (CA3 1994), cert. denied, 513 U.S. 1082 (1995); *Hanton v. Gilbert*, 36 F.3d 4, 6-7 (CA4 1994); *Daulton v. Affeldt*, 678 F.2d 487, 490 n.4 (CA4 1982); *Coats v. Pierre*, 890 F.2d 728, 732-33 (CA5 1989), cert. denied, 498 U.S. 821 (1990); *D'Andrea v. Adams*, 626 F.2d 469, 474-76 (CA5 1980), cert. denied, 450 U.S. 919 (1981); *Jackson v. Leighton*, 168 F.3d 903, 909-10 (CA6 1999); *Stern v. Shouldice*, 706 F.2d 742, 748-49 (CA6), cert. denied, 464 U.S. 993 (1983); *Mumford v. Godfried*, 52 F.3d 756, 760-62 (CA8 1995); *Peacock v. Duval*, 694 F.2d 644, 645-48 (CA9 1982). None of these cases contains the slightest hint that anything other than the ordinary standard of *Pickering*, *Connick*, and *Waters* applies when universities fire professors in retaliation for criticism on academic issues.

Any doubt on the subject ought to have been dispelled in *Harleston v. Jeffries*, 513 U.S. 996 (1994), when this Court vacated a judgment of the Second Circuit and remanded the case for further consideration in light of the recently-decided *Waters*. *Harleston* involved a professor demoted for giving a provocative speech in his area of academic specialization. This Court could not have given any clearer indication that *Waters* and its predecessors apply to state universities' academic personnel decisions. On remand, the Second Circuit duly reviewed the demotion under the standard set forth in *Waters*. *Jeffries v. Harleston*, 52 F.3d, at 12-14.

As a result of the decision below, it is only in the Seventh Circuit that discharges by universities are reviewed

according to a standard different from that applied to other public institutions. Had the Seventh Circuit followed the law used by the other circuits, it would have had to affirm the judgment of the District Court. The jury's verdict implies that it believed the evidence introduced by Feldman, which showed that he had been fired vindictively and unjustifiably, in retaliation for speech that the Seventh Circuit acknowledged was on an issue of public importance.

3. Permeating the Seventh Circuit's decision is an honorable desire to protect academic independence from judicial meddling. But academic freedom is already secure under *Waters* and its predecessors. Unsubstantiated claims of retaliatory firing are easily rejected on summary judgment, and the work of universities proceeds unimpeded. The parade of horribles put forward by the Seventh Circuit–juries making tenure and discharge decisions–has hardly materialized. The universities need no special exemption from this Court's ordinary First Amendment doctrine. And if they did, that exemption is of course not within the power of a circuit court to grant.

The real threat to academic freedom lies in the Seventh Circuit's decision itself. Criticizing the work of others is a normal part of academic life. Truth can be found only after competing falsehoods have been exposed and attacked. The marketplace of ideas is most effective when its inhabitants are at their most ruthless. Sometimes legitimate academic criticism stings, and sometimes the recipient, being human, harbors a grudge.

If the decision below accurately states the law, professors can now participate in this ordinary scholarly interchange only at added personal risk. When a mathematician finds a flaw in a colleague's proof, when a biologist disproves a pet theory of her department's chair, when a law professor discovers historical evidence showing a

colleague's interpretation of the constitution to be untenable–all must now proceed with greater caution. If they publish and are fired in retaliation for questioning an erroneous orthodoxy, they will have no redress under the First Amendment. They will find it a cruel irony to be told that "the only way to preserve academic freedom is to keep claims of academic error out of the legal maw." App., *infra*, 7a.

Also placed at risk by the Seventh Circuit's decision are professors who call attention to misconduct at their universities. State colleges and universities are very large and very important public institutions, which use public funds to educate a great many people. The mismanagement of those funds–for instance, by knowingly granting tenure to faculty who have lied about their credentials, as in this case–is a matter of intense public concern. When professors commit fraud, other professors are the ones most likely to find out, and the First Amendment can hardly require courts to do nothing while public universities fire the honest and retain the dishonest. A university's academic independence is not a license to steal from the taxpayers.

The decision below rests on the faulty assumption that academic freedom belongs solely to institutions, not individuals. In fact, as this Court has recognized, it belongs to both. *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985). The independence of academic institutions is a cherished value, but it is not a shield blocking courts from reviewing claims that the rights of individual professors have been infringed. *University of Pennsylvania*, 493 U.S., at 196-97. In cases like this one, when institutional autonomy and individual freedom come into conflict, courts properly respect both. In so doing, they ought to accord due deference to the decisions of university administrators, but they already do when they follow the procedure set forth in

Waters. A rule of *complete* deference, the rule created by the Seventh Circuit in this case, advances the academic independence of universities only by sacrificing the independence of professors. True academic freedom is advanced by considering the interests of both–not by carving out special privileges for university employers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Marcus B. Feldman, Plaintiff-Appellee, Cross-Appellant,

v.

Chung-Wu Ho and Board of Trustees of Southern Illinois University, Defendants-Appellants, Cross-Appellees.

Nos. 97-4243 & 98-1074

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

March 22, 1999, Decided

Before Harlington Wood, Jr., Flaum, and Easterbrook, Circuit Judges.

Easterbrook, Circuit Judge.

Southern Illinois University decided in spring 1990 not to renew the contract of Marcus Feldman, an assistant professor of mathematics then in his fourth year of teaching. Feldman received a terminal contract through June 1991. Litigation challenging this decision under the first amendment has lasted twice as long as Feldman's stint at the University.

Feldman charged Chung-Wu Ho, the Chairman of the Mathematics and Statistics Department, and many other leaders of the University with violating his freedom of speech. When the litigation began, his theory was that Ho had protected another colleague against Feldman's charge of plagiarism, by giving the accused colleague tenure while seeing to it than Feldman departed. On an interlocutory

appeal we held that some of the defendants were protected from suit by the eleventh amendment, and that Ho had immunity from damages on a first amendment claim. *Feldman v. Bahn*, 12 F.3d 730 (7th Cir. 1993). Feldman then recast his theory. In the new telling, Feldman had accused another colleague of trying to improve her standing by claiming falsely that she had written a paper jointly with a famous mathematician. The accused member of the faculty denied the charge, Ho took her side, and Feldman was given a terminal contract as a result. This contention was submitted to a jury, which returned a verdict of some $250,000 against Ho ($200,000 in actual and $50,000 in punitive damages) on a state-law claim that Ho interfered with Feldman's contract of employment. The jury also returned a verdict in Feldman's favor on a first-amendment theory against the University (technically, its trustees, named as its proxies under *Ex parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908)). Because of the eleventh amendment, damages were unavailable from the University (an arm of Illinois), but the verdict would have entitled the district judge to fashion equitable relief such as reinstatement. This the judge declined to do, remarking that the damages awarded against Ho are sufficient compensation. He also refused to award interest on the portion of the damages that represent back pay. But the judge did order the University to pay more than $185,000 as Feldman's legal fees. Cross-appeals challenge every aspect of this decision.

Given the verdict, we must assume that Ho reacted adversely to Feldman's accusation against his colleague and that this led the University to end Feldman's employment. We assume, moreover, that the academic conduct (or misconduct) of teachers at a state university is an issue of public importance rather than just of private interest to the persons involved. Compare *Connick v. Myers*, 461 U.S. 138, 75 L.

Ed. 2d 708, 103 S. Ct. 1684 (1983), with *Pickering v. Board of Education*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). But it does not follow that a jury rather than the faculty determines whether Feldman's accusation was correct. A university's academic independence is protected by the Constitution, just like a faculty member's own speech. Concurring in *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957), Justices Frankfurter and Harlan referred to the four freedoms *of a university*: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Although statutes have curtailed some of these freedoms (for example, no university today may use racial criteria to select its faculty), Feldman does not rely on any particular statute, as opposed to the all-purpose 42 U.S.C. § 1983 that provides a hook for enforcing the Constitution against state actors. Yet the Constitution does not commit to decision by a jury every speech-related dispute. If it did, that would be the end of a university's ability to choose its faculty–for it is speech that lies at the core of scholarship, and every academic decision is in the end a decision about speech.

> Teachers . . . speak and write for a living and are eager to protect both public and private interests in freedom to stake out controversial positions. Yet they also *evaluate* speech for a living and are eager to protect both public and private interests in the ability to judge the speech of others and react adversely to some. They grade their students' papers and performance in class. They edit journals, which reject scholarly papers of poor quality. They evaluate their colleagues' academic writing, and they deny continuing

> employment to professors whose speech does not meet their institution's standards of quality. See *Weinstein v. University of Illinois*, 811 F.2d 1091 (7th Cir. 1987). "The government" as an abstraction could not penalize any citizen for misunderstanding the views of Karl Marx or misrepresenting the political philosophy of James Madison, but a Department of Political Science can and should show such a person the door–and a public university may sack a professor of chemistry who insists on instructing his students in moral philosophy or publishes only romance novels. Every university evaluates *and acts* on the basis of speech by members of the faculty; indeed, Feldman proposed that Ho do just this on the basis of his colleague's speech. . . . Feldman . . . does not deny that speech in a university may be the basis of adverse action; he believes, rather, that the penalty should have fallen on the accused colleague rather than himself. Yet an unsupported charge of [academic misconduct] reflects poorly on the accuser; the first amendment does not ensure that a faculty member whose assessment of a colleague's work reveals bad judgment will escape the consequences of that revelation.

Feldman v. Bahn, 12 F.3d at 732-33 (emphasis in original). When sending this case to the jury, and resolving post-judgment motions, the district judge ignored these observations. Indeed, one could not tell from reading the district judge's opinions that the parties' dispute had ever reached this court before.

Speech often is a legitimate ground of decision in employment. Consider the political patronage cases. Although a state may not prefer Republican road crews over Democratic ones, *Elrod v. Burns*, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976), it may use political affiliation as a ground of decision for many other jobs. "The Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments. In sum, the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980). That principle cannot be limited to political affiliation. "The question is whether the hiring authority can demonstrate that [speech] is an appropriate requirement for the effective performance of the public office involved." *Waters v. Churchill*, 511 U.S. 661, 671-75, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994). "The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate." *Id.* at 675. (This passage appears in Justice O'Connor's plurality opinion, but seven Justices approved the principle. See 511 U.S. at 685 (Souter, J., concurring), 688-89 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in the judgment).)

A university seeks to accumulate and disseminate knowledge; for a university to function well, it must be able to decide which members of its faculty are productive scholars and which are not (or, worse, are distracting those who are). As we said the first time around, an unsubstantiated charge of academic misconduct not only squanders the time of other faculty members (who must analyze the charge, or defend against it) but also reflects poorly on the judgment of the accuser. A university is entitled to decide for itself whether the charge is sound; transferring that decision to the jury in the name of the first amendment would undermine the university's mission–not only by committing an academic decision to amateurs (is a jury really the best institution to determine who should receive credit for a paper in mathematics?) but also by creating the possibility of substantial damages when jurors disagree with the faculty's resolution, a possibility that could discourage universities from acting to improve their faculty. Cf. *Webb v. Ball State University*, 1999 U.S. App. LEXIS 1666, No. 98-1317 (7th Cir. Feb. 5, 1999). In the wake of *Waters* the second circuit held that a university may respond to an incendiary public speech by a faculty member without violating the first amendment, even though the speech addresses issues of public concern. *Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1995). *Jeffries* was a hard case, because the speech was given off campus. Our case is easy: Feldman charged a colleague with academic misconduct; the University investigated the charge and vindicated the colleague; and later it concluded that it could obtain better mathematicians than Feldman for its faculty. If the kind of decision Southern Illinois University made about Feldman is mete for litigation, then we might as well commit all tenure decisions to juries, for all are equally based on speech. If the University erred in telling Feldman to seek employment elsewhere that is

unfortunate, but the only way to preserve academic freedom is to keep claims of academic error out of the legal maw.

A public employer's entitlement to consider speech under *Waters* is limited to the kind of speech that is part of the employer's mission. If Feldman had campaigned for a candidate for Governor he could not have been sacked for supporting the losing party–though the University could require its faculty to refrain from running for office or injecting politics into the workplace. See *CSC v. Letter Carriers*, 413 U.S. 548, 37 L. Ed. 2d 796, 93 S. Ct. 2880 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973). Accusing the University's President of padding his expense account would have been a closer issue. See *Levenstein v. Salafsky*, 164 F.3d 345 (7th Cir. 1998). How public employees handle public funds is a matter of public concern, but if the speech proves excessively disruptive to the employer's mission then the employer may respond. Thus a faculty member's unwarranted charge of embezzlement might justify discipline under the approach of *Pickering*. But Feldman's speech was neither unrelated to his job (the case of supporting a Democrat for Governor) nor unrelated to mathematics (the case of charging the President with fiscal improprieties). Nor was it concerned with the *rules* by which academic departments at Southern Illinois University evaluate charges of scholarly misconduct. Feldman objected to the way the Mathematics Department handled its core business of choosing and promoting scholars. That task is both inevitably concerned with speech and so central to a university's mission that the university's role as employer dominates. This conclusion also knocks out the award of attorneys fees and makes it unnecessary to discuss Feldman's cross appeal, which seeks additional relief against the University.

Feldman's claim against Ho personally requires only brief analysis. He recovered under a state-law theory of tortious interference with contract. Ho advanced a jurisdictional defense: that this is a suit against the state, and thus foreclosed in federal court by the eleventh amendment. Feldman concedes that Illinois treats the state as the real party in interest, provides the public official with absolute immunity, and channels any litigation to the Illinois Court of Claims with the state as the defendant, whenever judgment for the plaintiff would control the state's actions. 705 ILCS 505/8(d); *Currie v. Lao*, 148 Ill. 2d 151, 592 N.E.2d 977, 170 Ill. Dec. 297 (1992). In a case that is almost the clone of ours, *Wozniak v. Conry*, 288 Ill. App. 3d 129, 679 N.E.2d 1255, 223 Ill. Dec. 482 (4th Dist. 1997), the court applied this rule to a suit by a faculty member of the University of Illinois against the department's chairman. Wozniak accused the chairman of falsely charging him with failure to live up to professional standards, tortiously interfering with his employment at the University because the chairman's statements cost him his teaching position. The court responded that such a claim is in effect one against the State of Illinois and may not proceed against the department's chairman.

Illinois follows the federal practice by making an exception for situations in which the public employee did not act within the scope of his employment or violated the Constitution. Under the Westfall Act, any tort claim against a federal employee for wrongs committed within the scope of his employment must be dismissed, and the United States substituted as the defendant, unless the plaintiff establishes a "constitutional tort." 28 U.S.C. § 2679(b)(2)(A); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 132 L. Ed. 2d 375, 115 S. Ct. 2227 (1995); *United States v. Smith*, 499 U.S. 160, 113 L. Ed. 2d 134, 111 S. Ct. 1180 (1991). Likewise in Illinois: "Whenever a state employee performs illegally,

unconstitutionally, or without authority, a suit may still be maintained against the employee in his individual capacity and does not constitute an action against the State of Illinois." *Wozniak*, 679 N.E.2d at 1259. See also *Nelson v. Murphy*, 44 F.3d 497, 505 (7th Cir. 1995). Feldman persuaded the district judge to allow his suit to proceed on the theory that Ho violated the first amendment. Yet we held in 1993 that Ho has immunity against any claim resting on the first amendment–and now we add, in light of the rest of this opinion, that there was no constitutional violation by the University as an entity. Ho acted within the scope of his employment when handling matters related to Feldman's tenure on the faculty, because "the occasion . . . would have justified the act, if [Ho] had been using his power for any of the purposes on whose account it was vested in him." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.); see also *Cross v. Fiscus*, 830 F.2d 755, 757 (7th Cir. 1987); *Restatement (2d) of Agency* §§ 228-29, 231-36 (1958). In this respect Ho's conduct is identical to Conry's. Whatever remedy state law offers to Feldman must come in a suit against the State of Illinois, and because of the eleventh amendment that suit belongs in state court.

The judgment is reversed, and the case is remanded with instructions to enter judgment on the merits for all defendants–but without prejudice to Feldman's ability to file suit against the State of Illinois in the state's Court of Claims.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

MARCUS B. FELDMAN,	)
	)
Plaintiff,	)
	)
vs.	) No: 95-CV-0452-PER
	)
CHUNG WU HO and THE MEMBERS OF THE SOUTHERN ILLINOIS UNIVERSITY BOARD OF TRUSTEES IN THEIR OFFICIAL CAPACITIES ONLY,	)
	)
Defendants.	)

MEMORANDUM AND ORDER

RILEY, District Judge:

I. Introduction

This case arose out of the termination of Marcus Feldman's contract of employment with Southern Illinois University at Edwardsville. Feldman filed suit against Chung Wu Ho and the members of the Southern Illinois University Board of Trustees. Feldman's claim against the Trustees was brought under **42 U.S.C. § 1983 and § 1988**. Specifically, Feldman alleged that the members of the Board wrongfully terminated Feldman in retaliation for exercising his right to free speech. Feldman claimed that Ho intentionally interfered with his employment contract and business expectancy.

Feldman sought injunctive relief, including reinstatement to his former position in the Department of Mathematics and Statistics, plus back pay. Feldman also sought compensatory and punitive damages, plus reasonable costs and attorneys' fees.

A jury trial was held in this Court from January 27, 1997 to February 7, 1997. The jury returned a verdict in favor of Feldman and against Ho, assessing damages in the amount of $253,918.19. The jury also returned a verdict in favor of Feldman and against the members of the Board of Trustees.[1] On August 5, 1997, the Court denied Feldman's request for back pay, reinstatement and front pay and granted Feldman's request for attorneys' fees. The Court denied Defendants' motion to dismiss for lack of subject matter jurisdiction.

On August 6, 1997, the Court entered judgment in favor of Feldman and against Ho for past earnings ($203,918.19) and punitive damages ($50,000). The Court also entered judgment in favor of Feldman and against the members of the Board of Trustees of Southern Illinois University. The Court granted the law firm of Husch & Eppenberger attorneys' fees in the amount of $186,105.75.

Now before the Court are Feldman's motion to amend the judgment and make additional findings and Defendants' motion for judgment, amendment to the judgment and a new trial. The Court first addresses Feldman's motion, then addresses Defendants' motion.

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[1] No monetary damages were assessed against the Trustees. This verdict was in the nature of a declaration.

II. Analysis

A. Feldman's Motion to Amend the Judgment and Make Additional Findings

(1) Prejudgment Interest

Feldman argues that he is entitled to prejudgment interest with respect to the judgment awarded for "past earnings" against Ho on Feldman's state tort law claim. A district court has discretion to award or deny prejudgment interest. ***Heiar v. Crawford County, Wisconsin*, 746 F.2d 1190, 1201 (7th Cir. 1984)**. The Court concludes that prejudgment interest is not proper in this case. Therefore, the Court **DENIES** Feldman's request for prejudgment interest.

(2) Collecting $203,918.19 Judgment from Ho or the Members of the Board of Trustees

Feldman maintains that he should have the option of recovering the $203,918.19 from either the members of the Board of Trustees as back pay or from Ho as actual damages. Once again, the Court concludes that an award of back pay to Feldman from the members of the Board of Trustees would constitute a double recovery, which is not authorized by law. Accordingly, the Court **DENIES** Feldman's request for back pay.

(3) Reinstatement or Front Pay

Feldman moved the Court to reconsider its denial of reinstatement and front pay. Although reinstatement is the preferred remedy, reinstatement is not always appropriate. Courts may consider the circumstances of the termination and the litigation in judging the hostility that has been engendered and any irreparable animosity that would weigh against reinstatement. Based on the record, the Court concludes that

reinstatement is not appropriate. Accordingly, the Court **DENIES** Feldman's request for reinstatement.

As to front pay, the Court also denies Feldman's request for front pay. Front pay is an equitable remedy, not a mandatory remedy. The decision whether or not to award front pay lies within the discretion of the district court. ***Graefenhain v. Pabst Brewing Company*, 870 F.2d 1198, 1201 (7th Cir. 1989).** In determining whether to award front pay, the Court considers all circumstances of the case. The jury already considered Feldman's claim for money damages. This Court may not now award damages under the rubric of front pay. ***Swanson v. Martwick*, 726 F. Supp. 210, 211 (N.D. Ill. 1989).** Therefore, the Court **DENIES** Feldman's request for front pay.

B. Defendants' Post-Trial Motions

(1) Members of the Board of Trustees' Motion for Judgment as a Matter of Law

The members of the Board of Trustees ("the Board") move for judgment as a matter of law or in the alternative for a new trial because (a) Feldman's speech was not a matter of public concern and not entitled to First Amendment protection and (b) Feldman's claim against the members of the Board of Trustees is barred by the Eleventh Amendment to the United States Constitution. For the following reasons, the Court **DENIES** the Board's motion for judgment as a matter of law and for a new trial.

[a] Feldman's Speech

The Board argues that Feldman's speech for which he claims he was terminated is not a matter of public concern and not entitled to First Amendment protection. To be protected by the First Amendment, a governmental employee's speech

must relate to a matter of public concern, and the employee's interest in expressing himself on this matter must not be outweighed by any injury the speech could cause to the interest of the state as an employer in promoting the efficiency of the public service it performs through its employees. ***Waters v. Churchill*, 511 U.S. 661 (1994) (citing *Connick v. Myers*, 461 U.S. 138 (1983)).**

The record establishes that Feldman's speech was a matter of public concern. Feldman raised concerns about the serious academic misconduct of a professor within a public university. Feldman presented evidence that Southern Illinois University at Edwardsville considered academic integrity to be a matter of public concern and that Feldman was following university policy by brining his concerns to Ho. Accordingly, the Court **DENIES** the Board's motion for judgment as a matter of law.

[b] Eleventh Amendment Immunity

The Eleventh Amendment bars suits against states for alleged deprivations of civil liberties. The only exceptions to this bar occur when the state has waived that immunity or when Congress has exercised its power under § 5 of the Fourteenth Amendment to override that immunity. ***Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).** To effectuate the latter, Congress must make its intention to do so "intentionally clear in the language of the statute." ***Id.*** But the *Will* decision does not preclude suits for injunctive relief against official capacity actors. ***Id.***

State agencies are treated like states for immunity purposes. ***Alabama v. Pugh*, 438 U.S. 781 (1978).** The SIU Board meets the definition of agency. **See *Kroll v. Board of Trustees of the University of Illinois*, 934 F.2d 904, 907 (7th Cir. 1991).** As a general rule, state university board are immune from suits seeking monetary damages.

However, under the doctrine of ***Ex parte Young*, 209 U.S. 123 (1908),** a suit for prospective relief is *not* deemed a suit against the state (or state agency) and thus is *not* barred by the Eleventh Amendment. ***Edelman v. Jordan*, 415 U.S. 651, 664 (1974); *Quern v. Jordan*, 440 U.S. 332, 337 (1979).**

Feldman has not sued Southern Illinois University's Board of Trustees. He sued the members of the Board of Trustees in their official capacities only, seeking prospective relief (reinstatement). Therefore, Defendant's Eleventh Amendment arguments fail. The Court has subject matter jurisdiction over the § 1983 claim and supplemental jurisdiction over the state law claims. Accordingly, the Court **DENIES** the members of the board of Trustees' motion for judgment as a matter of law and for a new trial.

(2) Ho's Motion for Judgment as a Matter of Law

Ho moved for judgment as a matter of law or in the alternative for a new trial based on the following: (a) Feldman's claim that Ho intentionally interfered with his contractual expectancy is subject to the exclusive jurisdiction of the Illinois Court of Claims; (b) Ho was acting in his official capacity as a state employee; (c) Ho was an agent of SIU for the purposes of Feldman's employment contract and, as a matter of law, could have not intentionally interfered with Feldman's contract; and (d) the evidence at trial did not support a claim of intentional interference with contractual expectancy. The Court rules as follows:

[a] Exclusive Jurisdiction of the Illinois Court of Claims and Ho's Immunity

Ho argues that he cannot be held individually liable, because he made a personnel decision in his official capacity as an agent for the State, and he is entitled to public official

immunity. Ho asserts that Feldman's claim for intentional interference with contractual expectancy is within the exclusive jurisdiction of the Illinois Court of Claims as provided by **705 ILCS 505/8(d)**. The Court is not persuaded by either of these arguments.

706 ILCS 505/8(d) states:

> The court shall have exclusive jurisdiction to hear and determine the following matters:
>
> > (d) all claims against the state for damages and causes sounding in tort if a like cause of action would like against a private person or corporation in a civil suit, and all like claims sounding in tort against . . . the [Board] . . . .

A suit against a state employee controls the state's actions when the relief sought would limit the ability of the employee to engage in lawful activity on behalf of the state. **See *Management Ass'n of Illinois, Inc. v. Board of Regents of Northern Illinois University*, 618 N.E.2d 694, 701 (1993).** However, there is an exception to this rule. "Whenever a state employee performs illegally, unconstitutionally or without authority, a suit may still be maintained against the employee in his individual capacity and does not constitute an action against the State of Illinois." ***Wozniak v. Conry*, 679 N.E.2d 1255, 1259 (Ill. App. 1997).** "Corrupt or malicious motive will operate to deny immunity to a public official acting in a discretionary manner." ***American Family Ins. Co. v. Seeber*, 574 N.E.2d 1222, 1226 (Ill. App. 1991).**

Based on the record, the Court rejects Ho's arguments. Evidence was adduced at trial that Ho's actions exceeded his authority and were unconstitutional. Ho is not entitled to immunity from an individual judgment.

[b] Intentional Interference with Feldman's Contractual Employment

Ho also argues that as a matter of law he *cannot* interfere with Feldman's contract and that the evidence produced at trial was insufficient to support such a claim.

Illinois law is clear that an individual tortfeasor acting for his own personal gain–contrary to the best interests of the employer–can be held liable for tortious interference. ***Marczak v. Drexel National Bank*, 542 N.E.2d 787 (Ill. App. 1989);*Vajda v. Arthur Anderson & Co.*, 624 N.E.2d 1343 (Ill. App.), cert. denied, 624 N.E.2d 818 (1993)**.

Here, Feldman's contract was with Southern Illinois University at Edwardsville, not with Ho. The record establishes that Ho's actions against Feldman were in furtherance of his own personal agenda by using false and misleading information to fire Feldman and that concealing documents were contrary to the interests of the institution. Ho's arguments fail. Accordingly, the Court **DENIES** Ho's motion for judgment as a matter of law or in the alternative for a new trial.

(3) Miscellaneous Motions

Ho contends that there was insufficient evidence to support the jury's award of punitive damages. The record establishes facts sufficient to award punitive damages. The Court instructed the jury on the issue of punitive damages. The jury found reason to believe that punitive damages were appropriate. Ho's request to eliminate the award of punitive damages is denied.

The members of the Board of Trustees maintain that the Court erred when it barred admission of the grievance panel's report to President Lazerson. The Court concluded that the grievance panel's report is hearsay. The Court, however, did allow evidence regarding the report and the fact

that the members of the Board of Trustees relied on the report.

Defendants further argued that the Court erred when it made comments before the jury in examining Dean Davis Steinberg, which Defendants contend were prejudicial to the jury. The Court's comments in front of the jury were not prejudicial and were appropriate under the circumstances.

Defendants also claim that the Court erred when it allowed Feldman's counsel to cross-examine Dr. Ledzewic with the Mary Cooper memos to the promotion and tenure committee. The Court finds that the memos were relevant, proper and not prejudicial.

Lastly, Defendants argue that the Court erred by awarding the law firm of Husch & Eppenberger attorneys' fees in the amount of $186,105.75, which included a $50,000 "bonus." Defendants move the Court to reconsider the award of $50,000. Under the Supreme Court's ruling in ***Hutto v. Finney*, 437 U.S. 678 (1978)**, attorneys' fees and costs assessed under **42 U.S.C. § 1988** in suits brought against public officials in their official capacity may be collected "either directly from the official, in his official capacity from funds of his agency or under his control, or from the State or local government." ***Id.* at 700**. Legal fees must be "reasonable" and not used to sanction defendants. ***Simpson v. Sheahan*, 104 F.3d 998 (7th Cir. 1997).** The attorneys' fees incurred by the law firm of Husch & Eppenberger are reasonable. Accordingly, the Court **DENIES** Defendants' request to reduce the amount of the attorneys' fees.

III. Conclusion

The Court **DENIES** Feldman's Rule 52(b) motion to amend the judgment and to make additional findings (Doc. 107). The Court **DENIES** Defendants' post-trial motions (Doc. 105).

IT IS SO ORDERED.
DATED this 24 day of November, 1997.

PAUL E. RILEY
United States District Judge

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
April 16, 1999.

Before
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

MARCUS B. FELDMAN *Plaintiff-Appellee,* *Cross-Appellant,*	)	Appeals from the United States District Court for the Southern District of Illinois.
Nos. 97-4243 98-1074	v.	No. 95-CV-0452-PER Paul E. Riley, *Judge*.
CHUNG-WU HO and BOARD OF TRUSTEES OF SOUTHERN ILLINOIS UNIVERSITY, *Defendants-Appellants,* *Cross-Appellees.*		

Order

Plaintiff-appellee/cross-appellant filed a petition for rehearing and petition for rehearing en banc on April 5, 1999. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.